

Educational & Recreational Services, Inc. d/b/a Associated Charter Bus Co., Las Virgenes Division and Studio Transportation Drivers Local 399, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Petitioner, Case 31-RC-5067

September 9, 1982

DECISION ON REVIEW AND ORDER

**BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN**

On June 30, 1981, the Acting Regional Director for Region 31 issued a Decision and Direction of Election in the above-entitled proceeding, in which he found that the Employer met both statutory and discretionary standards for the assertion of jurisdiction. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review on July 31, 1981, of the Acting Regional Director's Decision and Direction of Election on the grounds that, *inter alia*, the Acting Regional Director substantially departed from officially reported precedent and made clearly erroneous findings of fact. Also, on that date the Employer submitted a motion to reopen the record and an offer of proof alleging, *inter alia*, that there is evidence that the Las Virgenes Unified School District (School District) now exercises effective control over the labor relations of the Employer. On September 4, 1981, the Employer submitted an addendum to the motion to reopen the record and the motion to reopen the hearing, with supporting affidavits.

By telegraphic order dated September 25, 1981, the Board granted the Employer's request for review only as to whether under *National Transportation Service, Inc.*, 240 NLRB 565 (1979), the Employer retains sufficient control over the employment conditions of its employees to enable it to engage in meaningful bargaining with a labor organization. On December 29, 1981, the Board issued a Notice To Show Cause why the Board should not grant the Employer's motion to reopen the record for the limited purpose of admitting the affidavits of Donald D. Mort and Rory L. Livingston, and, if admitted, accept them as accurate.

Having received no response to the Notice To Show Cause from any of the parties to this proceeding, the Board hereby grants the Employer's motion to reopen the record to receive into evidence the affidavits of Donald D. Mort and Rory L. Livingston and accepts those affidavits as accurate.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issue under review, including the Employer's request for review and brief in support thereof, and makes the following findings:

The Employer, a wholly owned subsidiary of ARA Services, Inc., is a California corporation primarily engaged in supplying school bus transportation and related public services for students of the School District. For providing this service in 1980, the Employer received approximately \$700,000 in gross revenues. The Petitioner seeks to represent a unit of school bus drivers and mechanics employed by the Employer, approximately 35 employees.

The parties have stipulated that the School District is an exempt employer within the meaning of Section 2(2) of the Act. In opposing the petition, the Employer contends that it is a joint employer with the District and shares that governmental entity's exemption from the Board's jurisdiction. The Acting Regional Director, however, found that the Employer retains sufficient control over the employment conditions of its employees to enable it to engage in meaningful collective bargaining with the Petitioner. Applying the "right to control" test articulated in *National Transportation Service, Inc.*, *supra*, the Acting Regional Director found assertion of jurisdiction over the Employer to be appropriate and directed an election in the petitioned-for unit. For the reasons set forth below, we find the Acting Regional Director erred in asserting jurisdiction.

Pursuant to the Employer's current agreement with the School District, effective from September 1, 1978, to August 31, 1983, the Employer provides regular bus transportation for approximately 3,500 of the School District's students, as well as transportation for special education classes, field trips, and sports events. The Employer's 5-year contract with the School District can be renegotiated for an additional 5 years without submitting new bids. In addition, the Employer and the School District review the agreement on a quarterly basis.

The School District retains considerable rights under the current agreement to control the terms and conditions of employment of the Employer's drivers. The agreement, *inter alia*, provides that the School District has final approval over the right to make changes in routes and schedules planned by

the Employer;¹ all personnel hired by the Employer who are involved in providing service under the agreement are subject to the initial and continuing approval of the School District; the District has a right to request the discharge of any personnel; to the extent possible, drivers be permanently assigned to the same bus routes; and all buses must be maintained in first-class condition. The agreement further provides that all drivers shall be well groomed with an appropriate uniform and shall not smoke or use alcoholic beverages or drugs while on duty; that the Employer must maintain a comprehensive safety program and shall require all drivers providing service to the School District to attend regular safety classes; and that the Employer shall make certain reports available to the District including a weekly summary of all late or missed trips, copies of weekly driver logs, inspection reports, and monthly reports of preventative maintenance and repairs. Finally, the agreement provides that the School District may cancel the agreement for any default by the Employer.

The District also exercises substantial control over the Employer's employees through mechanisms not specifically delineated in the contract. Prior to the 1981-82 school year, the School District required the Employer to submit a list of state certified drivers for approval. In their affidavits, Donald D. Mort, the Employer's western area president, and Rory L. Livingston, purchasing agent for the School District, stated that for the 1981-82 school year all prospective employees of the Employer and all returning incumbent employees have been interviewed by Maggie Pryor, the School District's transportation coordinator. They further stated that, at these interviews, each driver's or candidate's records and personnel files were reviewed. Although it is not written into the agreement, each of the Employer's drivers now is required by the School District to wear a uniform blue shirt with a patch showing the insignia and the name of the Las Virgenes Unified School District, and an Associated Charter Bus Company patch on the other shoulder. Subsequent to the hearing in this case, the School District also directed the Employer to have all the buses utilized in the transportation of children for the District identified with the sign "Associated-Las Virgenes" in black letters. The Employer is now in the process of complying with this directive. At the School District's direction, the Employer instituted a plan for paid sick leave up to 3 days per year. The Em-

ployer implemented wage adjustments (with an across-the-board 8-percent increase) for the 1981-82 academic year only after approval by the School District.

Additionally, School District personnel play a dominant role in directing the Employer's daily operations. Thus, Maggie Pryor, the School District's transportation coordinator, spends her full time directing the busing operations. She works in a building on the schoolyard across from the building where the Employer's mechanics work on the buses. (These facilities are leased to the Employer by the School District.) In her role as transportation coordinator, Pryor confers with the Employer regarding driver assignments, directs particular driver assignments for field trips, decides the appropriate bus routes,² and meets with representatives of the Employer on a regular basis. Pryor also rides the buses on a periodic basis and calls meetings with the Employer's drivers. There is always a School District employee riding the bus for field trips. When complaints are received by the District concerning a particular driver, Pryor usually discusses the complaint with the Employer and occasionally discusses a complaint with the driver directly. The District has requested the transfer of drivers when it no longer finds them to be appropriate for driving in the School District. Such requests have always been honored.

The Employer's mechanics are hired without the School District's participation and are supervised by the Employer's division manager. The mechanics repair and maintain the Employer's school buses and, on occasion, assist in repairing the School District's vehicles. The Employer and the School District negotiate regularly concerning the wage rates for mechanics.

At the time the Acting Regional Director issued his Decision and Direction of Election, he found the School District's then proposed participation in the hiring of drivers to be speculative and that the Employer had historically controlled the wages and benefits paid to its employees. Relying on the evidence before him, the Acting Regional Director found that the District has not usurped the Employer's dominant role in establishing the employment conditions of its drivers and mechanics. In making this finding, the Acting Regional Director placed great emphasis on the Employer's ability to hire and terminate its employees, and the absence of the District's express contractual authority over

¹ In practice, Judy Farrow, the Employer's division manager, assigns drivers their routes, principally on the basis of driver availability. The School District has requested changes and the Employer has complied with all such requests.

² We note that the District has substantial control over the assignment of bus routes, as well as the scheduling of routes. Compare *Kal Leasing, Inc.*, 240 NLRB 892, 893 (1974), in which the Board noted that control over the employees' route assignments is relevant in determining the degree of control over terms and conditions of employment.

the Employer's operation. He concluded that the Employer retains wide discretion in the wages and benefits it pays its employees.

As noted above, subsequently the Board granted the Employer's motion to reopen the record for the purpose of admitting certain evidence dealing specifically with the institution for the 1981-82 school year of District participation in the hiring of drivers, the identification of the District on the drivers' uniforms and the school buses, and the District's directive to increase wages and paid sick leave. In light of the newly presented evidence by the Employer, we disagree with the Acting Regional Director and find that under the right-to-control test set forth in *National Transportation Service, Inc.*, *supra*, we must decline to assert jurisdiction.

Given the additional evidence submitted by the Employer, we find that not only does the School District have considerable authority over the Employer's operations by virtue of the express language of the parties' agreement but also, as uncontroverted evidence of the established operations at the Employer conclusively demonstrates, the School District exercises extensive control over the

wages, benefits, hiring, termination,³ discipline, supervision, and work assignments of the Employer's bus drivers.⁴ In reaching this conclusion, we note that the School District does not appear to exercise the same degree of control over the terms and conditions of employment of the mechanics. Nevertheless, the Petitioner seeks a unit of all bus drivers and mechanics. The record demonstrates that the District has substantial control over the Employer's labor relations of at least a substantial segment of the unit sought and is a joint employer of the Employer's employees.⁵ We therefore conclude that we are precluded from asserting jurisdiction here and we shall dismiss the petition.

ORDER

It is hereby ordered that the petition be, and it hereby is, dismissed.

³ The Acting Regional Director found that the School District had never requested the Employer to terminate a bus driver. The evidence indicates, however, that the School District has requested that drivers who engaged in egregious behavior no longer drive for the School District, and the Employer has complied with all such requests by transferring the drivers.

⁴ We note that the Board regularly looks beyond contractual form to substantive practices in order to ascertain the true nature of an employer's labor relations. E.g., *K.A.L. Leasing, Inc.*, 254 NLRB 1118 (1981).

⁵ See *Educational and Recreational Services, Inc., d/b/a Associated Charter Bus Company, San Bernardino Division*, 261 NLRB 448 (1982); *ARA Services, Inc.*, 221 NLRB 64 (1975).